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SERVICE DATE - OCTOBER 20, 2003

SURFACE TRANSPORTATION BOARD
Washington, DC 20423-0001

STB Docket No. AB-167 (Sub-No. 1095X)

**Consolidated Rail Corporation – Abandonment Exemption –
Lancaster and Chester Counties, PA**

NOTICE TO THE PARTIES:

On October 24, 2002, the Surface Transportation Board (Board) issued a Notice to the Parties (October 2002 Notice) in the above-titled rail abandonment proceeding. The October 2002 Notice set forth the background of the case, described the Board's reinitiation of the section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, pursuant to the decision of the United States Court of Appeals for the Third Circuit in Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Bd., 252 F.3d 246 (3rd Cir. 2001) (FAST), and solicited comments on certain issues regarding this reinitiation. In response to the October 2002 Notice, the Board received 18 comment letters, as well as a letter replying to the comments of other parties, all of which were placed on the Board's website.

The Board's Section of Environmental Analysis (SEA) has reviewed the comments. Based on the information therein as well as ongoing consultations with the Advisory Council on Historic Preservation (ACHP), the Pennsylvania State Historic Preservation Officer (SHPO), and Norfolk Southern Railway Corporation (NS), SEA has developed a plan to complete the section 106 process for this proceeding. The ACHP, the SHPO, and NS have indicated their approval of SEA's plan, as well as their willingness to sign the attached proposed draft Memorandum of Agreement (MOA). Changes suggested pursuant to consulting party and public review and comment will be considered. Below, SEA (1) summarizes and responds to the comments, including those that favor converting this railroad right-of-way to interim trail use/rail banking pursuant to 16 U.S.C. 1247(d) (Trails Act), or a privately negotiated trail use agreement entered into after the abandonment is consummated, (2) discusses the remaining steps in the section 106 process for this case, assuming that trail use here is unsuccessful, and (3) describes the attached proposed draft Memorandum of Agreement (MOA) setting forth proposed section 106 mitigation. As discussed in more detail below, SEA has also scheduled a public meeting on this case and the proposed draft MOA and is providing a 45-day period for interested parties to file written comments on the proposed draft MOA.

I. Comment Summary and Response

A. Historic Eligibility of the Enola Branch Rail Line

Comment. NS states that it disagrees with the designation of the Keeper of the National Register of Historic Places (Keeper) that the entire line is historic.

Response. As explained in the October 2002 Notice, pursuant to the Keeper's determination, the ACHP regulations, and the court's holding in FAST, the entire line is historic. NS has not provided any compelling reasons that would undermine the conclusions of the Keeper, the ACHP, and the court.

B. Clarification of the Length and Location of NS's Remaining Line

Comment. NS's reply comments attempt to clarify the name, exact length and location of the rail line that is the subject of this proceeding. NS states that the proper name for the rail line was the Atglen and Susquehanna Branch, because the rail line runs from a location near Atglen, PA to a location near the Susquehanna River. According to NS, the notice of exemption Consolidated Rail Corporation (Conrail) filed in 1989 was for 66.5 miles of track, but only 33.9 miles of this is actual rail right-of-way. NS states that the rail line extends from Milepost 0.0 at CP "Park" in Parkesburg, PA to Milepost 33.9 near a connection with the Port Road Branch at CP "Port" in Manor Township, PA. The other 32.6 miles of track referred to in the notice of exemption refer to the second track of the double tracked rail line between approximately Milepost 1.1 and Milepost 33.7. Subsequently, NS has indicated that it will return to the use of the designation "Enola Branch" for this line in this proceeding because of Conrail's use of this name during the period that it operated the line and the long use of this name in this proceeding.

NS also states that it currently intends to retain the property between Milepost 27.0 at Safe Harbor, PA and Milepost 33.9 at Port, PA in connection with its operation of the Port Road Branch; and between Milepost 0.0 at Parkesburg, PA and Milepost 1.5 at Lenover, PA, except for Amtrak's bridge, for use as the Parkesburg Industrial Track. According to NS, no abandonment authority or exemption was necessary because these line segments will continue to be owned by NS and used for railroad purposes; only one of the two tracks will be removed. For the same reason, NS states that there will be no adverse effect on historic properties on these segments.

NS also states that Conrail sold the portion of the rail line between Milepost 1.5 at Lenover to Milepost 4.0 near the Chester County-Lancaster County line to Southeastern Pennsylvania Transportation Authority (SEPTA) in 1996. Thus, according to NS, the only portion of the rail line (if any) that is subject to this section 106 process is from about Milepost 4.0 in Chester County, PA (the end of a bridge over Noble Road and Octoraro Creek and about 50 yards of access to the bridge) to Milepost 27.0 at Safe Harbor, or approximately 23 miles of rail right-of-way.

Response. Conrail described the line to be abandoned in its 1989 notice of exemption filing as two parallel tracks of a double tracked line. According to Conrail, track number 1 extended 32.6 miles from Milepost 1.1 in Parkesburg to Milepost 33.7 in Manor Township. Track number 2 extended 33.9 miles from Milepost 0.0 in Parkesburg to Milepost 33.9 in Manor Township. Subsequent descriptions of the line mistakenly referred to the total length of the line to be abandoned as either 66.5 miles of track or 66.5 miles of rail line. SEA agrees with NS that the length of the line is the actual length of the right-of-way. Thus, the line originally at issue here extended 33.9 miles, from Milepost 0.0 in Parkesburg to Milepost 33.9 in Manor Township.¹

Moreover, it now appears that Conrail sold the portion of the line between Milepost 1.5 to Milepost 4.0 to SEPTA in 1996, so that NS now retains ownership only of the line from Milepost 0.0 to Milepost 1.5 and from Milepost 4.0 to Milepost 33.9. As the court stated in FAST, “[i]f, on remand, the [Board] concludes that [NS] has disposed of some portion of the line, the [Board] will be without power to expand the historical condition to cover that property already sold.” See FAST 252 F.3d at 262. Accordingly, this proceeding, pursuant to the court’s remand, will be applicable to the NS-owned portions of the line from Mileposts 0.0 to 1.5 and Mileposts 4.0 to 33.9.

NS suggests that this proceeding does not apply to the line between approximately Mileposts 0.0 and 1.5, and between Mileposts 27.0 and 33.9 because NS intends to retain that portion of the Enola Branch as industrial track. However, NS never sought to dismiss its request for authority to abandon that track, and, under the court’s remand, this proceeding includes that track.

C. The Possibility of Trail Use Here

Comment. Friends of the Atglen-Susquehanna Trail, Inc. (FAST), the Pennsylvania Department of Conservation and Natural Resources (DCNR),² the County of Chester, the Historic Preservation Trust of Lancaster County, and certain individuals commented that interim trail use/rail banking would be appropriate here, which, if an agreement could be entered into, would result in preservation on any railbanked portions of the right-of-way for the duration of the interim trail use. In consultations, the SHPO indicated that, if the Trails Act remains available, and if a Trails Act agreement could be reached that would preserve the contributing resources on the rail line right-of-way, there would be no adverse effect on historic properties, thereby presumably mooted the need to continue with the mitigation stage of the section 106 process (development of an appropriate MOA).

¹ The October 2002 Notice incorrectly described the line as extending from Milepost 0.0 to Milepost 27.0.

² DCNR stated that the Lancaster County Commissioners have expressed interest in sponsoring a rail-to-trail project.

Comment. NS has stated that it would consider a proposal for trail use that meets certain criteria. Specifically, NS states³ that it would seriously consider any proposal for trail use that is made promptly so as not to delay the conclusion of this proceeding and that:

(1) does not result in the commitment of any additional railroad funds than are already committed to this project, (2) does not result in the commitment of any substantive amount of railroad time to the project, (3) does not result in any additional liability for the railroad, (4) does not result in any continuing responsibility to the project by the railroad after it has consummated that abandonment and conveyed the relevant segment of the [l]ine, (5) completely satisfies all of the [Townships of West Sadsbury, Sadsbury, Eden, Bart, Providence, Martic, and Conestoga (Townships)] and [Pennsylvania Department of Transportation (PennDOT)], and (6) is acceptable to the [Pennsylvania Public Utility Commission (PUC)] in substitution for its previous order.

NS also has indicated that it will honor the settlement agreements entered into by Conrail and approved by PUC. Specifically, Conrail entered into an agreement with the Townships under which it would convey segments of the abandoned line to the respective Township through which each segment passed; the Townships would assume future ownership and maintenance responsibility for the line and the crossing structures; Conrail would contribute an agreed sum of money to the Townships for the future maintenance of the crossing structures that are to remain in place; and certain other crossing structures deemed to constitute serious highway safety hazards would be removed by either Conrail or a specified Township. Conrail entered into a similar settlement agreement with PennDOT. See PUC Docket Nos. A-00111016 and C-00913256, Board of Supervisors of Bart Township v. Consolidated Rail Corporation, Pennsylvania Department of Transportation, and Lancaster County, et al., October 9, 1997. NS has indicated that any agreement with a potential trail sponsor to use the right-of-way as a trail would have to be acceptable to the Townships and PennDOT.

Response. The Trails Act allows rail line that would otherwise be abandoned to be preserved (rail banked) and used in the interim as trails. See Preseault v. ICC, 494 U.S. 1 (1990). The trail sponsor must assume responsibility for any taxes on, and tort liability for, the property. 16 U.S.C. 1247(d). The Trails Act delays abandonment of a line (and any consequent reversion of rail easements to adjacent property owners) as a matter of law while the line is rail banked and interim trail use continues, and provides that the line may be reactivated for rail service at any time. Id. Alternatively, if the railroad owns the property in fee, a railroad can convert its property to trail use outside the auspices of the Trails Act after the abandonment is consummated. See Hayfield N. R. Co. v. Chicago & North

³ See NS Reply Comments at 47.

Western Transp. Co., 467 U.S. 622, 633-34 (1984) (Hayfield Northern) (following abandonment, rail right-of-way is like any other property).⁴

The Board's procedures for establishing interim trail use/rail banking on a rail line proposed for abandonment pursuant to 16 U.S.C. 1247(d) are detailed in the Board's regulations at 49 CFR 1152.29 and are separate from the section 106 process. Parties interested in pursuing interim trail use under the Trails Act for this proceeding would have to follow the Board's regulations to do so. Although trail use requests are normally due within 10 days after the date on which the notice of exemption is published in the Federal Register for notice of exemption abandonment proceedings, the Board generally accepts late-filed requests for interim trail use as long as it retains jurisdiction over the subject rail line in a particular proceeding. However, interim trail use under 16 U.S.C. 1247(d) is voluntary on the part of both the railroad and the potential trail sponsor,⁵ and the Board cannot impose an interim trail use arrangement upon unwilling parties. Thus, while it is possible that interim trail use under the Trails Act could occur in this case on the portion of the line that NS still owns and controls⁶ – if a potential trail sponsor files an interim trail use/rail banking request in accordance with 49 CFR 1152.29 during this remanded proceeding, NS agrees to negotiate with the potential trail sponsor, and the parties ultimately enter into a Trails Act arrangement – it would be inappropriate for the Board to force the parties to negotiate or to include a trail use condition as part of the section 106 mitigation measures for this proceeding.⁷

⁴ Just as with interim trail use under 16 U.S.C. 1247(d) there presumably would be no adverse effect on historic properties under a private trail arrangement that would preserve the contributing resources on the rail line right-of-way and the need to continue with the mitigation phase of the NHPA process could be mooted.

⁵ A railroad is under no obligation either to negotiate concerning or enter into an interim trail use/rail banking arrangement. See 49 CFR 1152.29(b)(1); Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 482-483 (2d Cir. 1988); National Wildlife Fed'n v. ICC, 850 F.2d 694, 696 (D.C. Cir. 1988); Washington State Dep't of Game v. ICC, 829 F.2d 877, 879-82 (9th Cir. 1987).

⁶See discussion above on pages 2-3.

⁷ NS has indicated that although it might agree to a proposal to use this right-of-way as a trail under the circumstances discussed above, it does not believe that issuance of a trail condition by the Board (a notice of interim trail use or NITU) would be appropriate here. If NS continues to take this position, any trail use would have to be by private arrangement of the parties following consummation of the abandonment and conclusion of the section 106 process.

D. Summary of Other Comments and SEA's Response

Assuming that there is no agreement for trail use and that the mitigation phase of the section 106 process goes forward for the NS-owned portions of the line from Mileposts 0.0 to 1.5 and Mileposts 4.0 to 33.9, this section discusses the comments and responses received regarding section 106.

1. Identification of additional consulting parties to the section 106 process. *Comment.* FAST commented that SEA needs to make a greater effort to identify as many consulting parties as possible, and should include local community groups in the consultation process. FAST and other commenters requested that certain specific parties be included as consulting parties to the proceeding.

Response. Prior to issuing the October 2002 Notice and pursuant to the ACHP's regulations for implementing the section 106 process, 36 CFR 800.3(f), SEA consulted with the SHPO to identify possible consulting parties. SEA also conducted internet searches, contacted local government entities, and obtained updated addresses for parties that had been interested in earlier stages of the case. The Board then served the October 2002 Notice on 149 parties, placed the October 2002 Notice on the Board's website, and published the October 2002 Notice in the Federal Register, requesting comments and information on the identification of additional consulting parties. The Historic Preservation Trust of Lancaster County, Lancaster County Conservancy, Lancaster Farmland Trust, the Northeast Regional Field Office of the Rails-to-Trails Conservancy, PennDOT, and Southern End Community Association have requested to be granted official consulting party status. SEA agrees that these six parties should be consulting parties, and, based on the history of this proceeding, has also included FAST and the Townships as official consulting parties for this section 106 process. All of these parties will be invited to concur on the terms of the final MOA.

Furthermore, SEA has added the names of all additional parties identified by commenters to the service list for this proceeding,⁸ and has updated the names of the elected officials on the service list. The service list now stands at 211 parties.⁹ SEA believes that its efforts to identify consulting parties have been extensive.

⁸ SEA was unable to locate the addresses of several of the additional organizations submitted by FAST. These organizations are: Town and Country Garden Club, Christiana Lions Club, Lancaster County Wildlife Center, the Lancaster Environmental Alliance, Octoraro Area Trail Society, Penn Manor Neighborhood of Girl Scouts, and a high school track and cross country club.

⁹ The 51 potential consulting parties identified in the October 2002 Notice were primarily group entities or organizations. For some of these parties, multiple names were acquired and added to the service list for this proceeding. Therefore, the total number of 211 parties includes multiple individuals affiliated with the same organization, as well as individuals unaffiliated with any organization.

All official consulting parties as well as all parties on the service list will receive a copy of the attached proposed draft MOA, an opportunity to provide written comments on the proposed draft MOA, and information on how to participate in a planned public meeting. Opportunities for public involvement are discussed in more detail below in Section II.

2. Any need for further assessment of adverse effects on the line. *Comment.* PennDOT submitted comments stating that if any of the bridges on the line are individually eligible for inclusion in the National Register of Historic Places (National Register), then the effects of the proposed abandonment on the individually eligible bridges should be determined and taken into consideration when developing appropriate mitigation.

Response. As stated above and in the October 2002 Notice at 4-6, the Keeper has determined that the entire line is historic, including all sites and structures on the line. Therefore, SEA will treat the entire line as historic in accordance with the Keeper's determination and the ACHP regulations. Separate review of the bridges on the line is unnecessary because all bridges on the line will be treated as historic.

Comment. FAST commented that a current analysis of the historic and archeological resources, and a new environmental study of the environmental and physical characteristics of the line should be performed. FAST also recommended that a title search be undertaken and that the assessment of adverse effects should be extended to a continuation of the line in Cumberland and York Counties.

Response. Because SEA is considering the entire line to be historic, including all sites and structures on the line, conducting a survey of all the archeological and historic resources on the line before developing mitigation measures is unnecessary. However, a SEA staff member has driven by portions of the right-of-way and inspected the current physical condition of the line. As stated in the October 2002 Notice, the tracks and ties have mostly been removed, and though there is some overgrowth of vegetation in the area, the right-of-way on NS's line appears to be intact.¹⁰ Additionally, because the tracks and ties have already been removed from much of the right-of-way, there is little chance that the abandonment will affect previously undisturbed ground or impact archeological sites.¹¹ However, after completion of the section 106 process and the conclusion of the abandonment proceeding before the Board, NS would be able to remove the structures on the line and any remaining

¹⁰ In its reply comments, NS explains that portions of the line have been retained by NS and are still being used for industrial track use.

¹¹ NS has stated that it plans to remove a limited number of structures on the line, and that "little land will be disturbed by the removal of these structures which are mainly above ground." See NS Reply Comments at 61.

track and ties, which could disturb previously undisturbed ground. As discussed in more detail in Section III, the proposed draft MOA contains provisions for protecting any potential archeological resources from unforeseen impacts.

In accordance with the National Environmental Policy Act (NEPA), the Board issued an Environmental Assessment for this proceeding in 1989. According to the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA, environmental analyses should be supplemented if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR 1502.9(c). The NEPA review of this proceeding was completed long ago. No party has submitted any evidence indicating new circumstances or information that would warrant the undertaking of a supplemental environmental analysis at this late date. Furthermore, the court in FAST only remanded this proceeding to the Board to deal with procedural matters related to the historic review process under section 106. Therefore, SEA need not reconsider the adequacy of its NEPA review here.

SEA does not believe that a title search need be undertaken as part of the section 106 process. The Board cannot compel post-abandonment use of a rail line for non-transportation purposes. See Hayfield Northern. Therefore, the ownership of the property after an abandonment is consummated is not affected by the Board's action and not part of the Board's section 106 review.

The Board cannot extend the assessment of adverse effects to areas in Cumberland and York Counties that are not on the line because this proceeding is necessarily limited to the rail line proposed for abandonment. See Implementation of Environmental Laws, 7 I.C.C.2d 807, 828-29 (1991).¹²

3. Appropriate section 106 mitigation measures. As stated in the October 2002 Notice at 6-7, the Board's ability to protect historic properties is very limited. Essentially, documentation of the historic resources (taking photographs or preparing a history) before they are altered or removed is the only form of nonconsensual mitigation that the Board can require. The Board does not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the railroad's transfer of its property, as a condition to obtaining abandonment authority. Any attempt to either preclude or force a railroad to sell (or donate) property for a non-rail purpose, as a condition to obtaining abandonment authority, would plainly constitute an unauthorized taking under the Fifth Amendment. See Implementation of Environmental Laws, 7 I.C.C.2d at 828-29, and cases cited therein.

¹² The Enola Branch rail line is part of a larger rail corridor that extends into Cumberland and Dauphin Counties. Although the proceeding before the Board and this section 106 process pertain only to the right-of-way described above in Section II(B), it should be noted that the SHPO has determined that the portions of the rail corridor in Cumberland and Dauphin Counties are eligible for listing in the National Register.

The October 2002 Notice requested comment on appropriate historic preservation mitigation measures, including comments on the measures specified in a proposed draft MOA for this line developed earlier, and suggestions for additional or alternative measures, as well as information regarding the current condition of the rail line. As stated in the October 2002 Notice at 3, the earlier proposed draft MOA would have provided for photographic documentation of certain bridges, and the development of a public, interpretative display in the form of a 6-8 minute video outlining the history of the Enola Branch.

Comment. NS commented that it has complied with the terms of the earlier proposed draft MOA. NS states that the five bridges that the PUC has ordered to be removed for safety reasons have been recorded to state standards, and that NS has paid \$15,437 to the Pennsylvania Railroad Museum to develop a video and exhibit of the rail line. NS states that the settlement agreement between Conrail and the Townships should also be considered a mitigation measure.

Comment. PennDOT states that mitigation should provide for documenting a sampling of the bridges rather than all of the bridges on the line. PennDOT also suggests that additional outreach and preservation should be conducted, such as publishing a more comprehensive history of the line and providing money to municipalities to take over the maintenance of as many bridges as possible.

Response. As discussed in more detail in Section III and the proposed draft MOA, the Board, the SHPO, and NS will work together to develop a list of appropriate representative structures to be documented. Documentation of these representative structures will serve to document the historic nature of the line as a whole. Moreover, NS will be required to conduct archival research and to consolidate all information – documentation and the results of the archival research – into one cohesive document to be archived at the SHPO’s office. The mitigation in the proposed draft MOA constitutes a marked change from the first proposed draft MOA, which treated only six bridges as historic, not the line as a whole, and did not require archival research. As stated above, NS’s settlement agreements with the Townships and with PennDOT provide for local maintenance of structures that would remain intact. However, because the Board’s ability to impose mitigation for the protection of historic resources is limited, such agreements, if any, must be entered into voluntarily and are not within the scope of this section 106 process. As discussed in Section III below, SEA believes that the archival research discussed above and documentation of the line to Pennsylvania state standards¹³ using

¹³ Pennsylvania state standards are outlined in the guidance document titled “How To Complete the Pennsylvania Historic Resource Survey Form,” available from the SHPO, and require the submission of a photo/site plan sheet, a data sheet, and a narrative sheet.

representative structures on the Enola Branch is sufficient and that, given the mitigation that NS has already undertaken, a more comprehensive history of the line need not be prepared.¹⁴

4. Methods or outlets for publicizing a proposed MOA. *Comment.* Commenters recommend widespread notification and public participation in the section 106 process, including press releases and public meetings.

Response. To ensure widespread notice and opportunity for public participation the Board placed all comments received in response to the October 2002 Notice on the Board's website, and informed all interested parties of the availability of the comments on the website. SEA is sending this current Notice to the Parties (October 2003 Notice) to all 211 parties on the service list for this proceeding, as well as publishing the October 2003 Notice in the Federal Register and posting it on the Board's website. The Board has also issued a press release describing the contents of the October 2003 Notice.

As discussed in more detail below, SEA will accept written comments on the attached proposed draft MOA, and will also hold a public meeting before the close of the comment period to enable interested parties to provide oral comments. As a result, there will be ample opportunity for public participation and broad notice of the continuing section 106 process here.

Comment. PennDOT states that public input is required while developing the proposed draft MOA and before deciding how to resolve adverse effects of the undertaking, rather than after the proposed draft MOA is developed. PennDOT also states that the Board should provide the documentation regarding the section 106 process to the public in the manner set forth in 36 CFR 800.11(e).

Response. The October 2002 Notice provided members of the public with the opportunity to comment on all aspects of this proceeding, including ways to mitigate adverse effects. All comments received were placed on the Board's website, and the proposed draft MOA is also being distributed for public comment and placed on the Board's website. Moreover, as discussed in detail below, SEA will host a public meeting to receive additional public input on this proceeding in Quarryville, Pennsylvania on November 19, 2003. Thus, SEA believes that ample opportunity has been provided to the public to participate in the section 106 process here.

Section 800.11(e) of 36 CFR outlines the documentation that must be made available to the public when an agency determines that an action will have an adverse effect on historic properties.

¹⁴ As indicated above, NS has already paid to the Pennsylvania Railroad Museum \$15,437 to fund an exhibit or video of the history of the Enola Branch.

SEA believes that all of the required documentation already has been prepared and made publicly available.¹⁵

5. Other concerns. *Comment*. Several parties commented that they are concerned about public safety at the road crossings along the right-of-way of the line, and advocated bringing the section 106 process to a close as soon as possible. Commenters also state that the PUC issued an order addressing existing safety issues, which has been stayed pending the outcome of this section 106 process.

Response. SEA acknowledges the public safety concerns expressed by the commenters. SEA is working to complete the section 106 process as expeditiously as possible, pursuant to the relevant regulations and procedures.

Comment. FAST states that NS's plans regarding the line should be made known.

Response. In its reply comments at 50, NS directly responded to FAST's request to detail its plans regarding the line. SEA has made all comments received to date, including NS's reply comments, available to all on the Board's website. NS's response is as follows:

[NS] now intends to retain that portion of the Line between Milepost 0.0 at Parkesburg, PA and Milepost 1.5 at Lenover, PA, except for Amtrak's bridge, for use as the Parkesburg Industrial Track. Conrail sold the Line between Milepost 1.5 at Lenover, PA and Milepost 4.0 near the Lancaster County/Chester County Line to SEPTA. [NS] intends to honor the Settlement Agreements with PennDOT and the Townships pertaining to disposition of the Line between Milepost 4.0 near the county line and Milepost 27.0 near Safe Harbor, PA to the Townships and with respect to the

¹⁵ Section 800.11(e) states that documentation of a finding of adverse effect "shall include: (1) A description of the undertaking specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary; (2) A description of the steps taken to identify historic properties; (3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register; (4) A description of the undertaking's effects on historic properties; (5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and (6) Copies or summaries of any views provided by consulting parties and the public." Here, the October 2002 Notice described the undertaking, specified the area of potential effects, described the steps taken to identify historic properties, described the determination of eligibility of the line for inclusion on the National Register, and discussed the finding of adverse effect. As discussed above, all comments received in response to the October 2002 Notice have been made publicly available.

bridges to be removed. [NS] intends to retain possession of the property between Milepost 27.0 near Safe Harbor, PA and Milepost 33.9 at Port, PA in connection with its operation of, and in order to protect, the Port Road Branch. It may retain or place excepted track on all or a portion of this Line.

Comment. FAST states that the PUC order approving the settlement agreement with the Townships conflicts with the section 106 process because the order does not include mitigation, does not incorporate the viewpoints of all the consulting parties, and was formulated prior to the issuance of the Keeper's determination and the court's decision. FAST states that NS should acknowledge that the order may need to be modified or vacated depending on the outcome of the section 106 process.

Response. The requirements of NHPA and the ACHP's regulations apply to the abandonment action pending before the Board. Post-abandonment use of the line's right-of-way is outside of the Board's jurisdiction. The settlement agreement is thus outside the Board's abandonment process, including section 106.

Comment. NS argues that the section 106 process does not apply to rail line abandonment proceedings, because rail abandonment proceedings and the railroad's post-abandonment activities are not Federal undertakings for the purposes of section 106 review, as specified at 16 U.S.C. 470w(7). NS argues that a project must be Federally funded in whole or in part to be considered a Federal undertaking, and notes that in notice of exemption proceedings, such as this abandonment, Federal funding is not involved. Furthermore, according to NS, in notices filed pursuant to a class exemption, the Board's responsibilities are ministerial in nature, because the exercise of the class exemption must be allowed so long as the statutory and regulatory criteria are met. NS also states that the Board's jurisdiction over a rail line ceases as soon as an abandonment is consummated, and that the Board cannot control a railroad's post-abandonment activities regarding the rail line, which is private property. Therefore, NS argues, the section 106 process causes unnecessary delay, and the Board should discontinue the section 106 process in this proceeding and in all other rail line abandonment proceedings.¹⁶

Response. It is well settled that section 106 of NHPA applies to all rail line abandonment proceedings. See Implementation of Environmental Laws, 7 I.C.C.2d at 826; Illinois Commerce Comm'n v. ICC, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988) cert. denied, 488 U.S. 1004 (1989). Indeed, in FAST, the court specifically found that rail abandonment proceedings, including this

¹⁶ NS has subsequently indicated that because this argument was raised in comments to the October 2002 Notice rather than a formal motion before the Board, it is not requesting a response from the Board on this matter at this time. SEA's response is provided here to clarify SEA's position on the section 106 process for this proceeding and should not be construed as a formal Board response to NS's argument.

particular notice of exemption proceeding, were subject to section 106. See 252 F.3d at 251. An undertaking for the purposes of NHPA clearly includes actions that require Federal approval, not simply those that are federally funded. The ACHP's regulations implementing NHPA define an undertaking covered by NHPA as embracing "a project, activity, or program . . . requiring a Federal permit, license or approval." See 36 CFR 800.16(y). A railroad must obtain Board authority under 49 U.S.C. 10903 or 49 U.S.C. 10502 to abandon a common carrier line of railroad such as the Enola Branch. Moreover, use of a class exemption for an abandonment can be revoked for a particular line, when the STB finds that regulation is necessary to carry out the national rail transportation policy. 49 U.S.C. 10502(d). Thus, section 106 applies to notice of exemption abandonment proceedings such as this abandonment.

Comment. FAST states that the comments provided by the SHPO and the ACHP on the October 2002 Notice prior to its issuance should be made public.

Response. The October 2002 Notice incorporated the comments that the SHPO and the ACHP provided. The written comments provided by the SHPO and the ACHP prior to the issuance of the October 2002 Notice have been placed in the public docket for this proceeding and thus are available to the public.

II. Next Steps in the Section 106 Process

A. Public Meeting

The Board will hold a public meeting to solicit oral comments on this case and the attached proposed draft MOA. The meeting will be held at **the Hoffman Building, located at the Solanco Fair Ground in Quarryville, PA, on November 19, 2003 from 3 p.m. to 5 p.m. and from 6 p.m. to 8 p.m.** SEA will give a brief presentation and interested parties may submit written comments or make oral comments. SEA will have a court reporter available at each session to ensure that oral comments are accurately captured. Both the afternoon and evening sessions will follow the same format and utilize the same agenda; it is not necessary to attend both sessions.

Persons wanting to speak at the public meeting are strongly urged to pre-register by calling (202) 565-1643 and providing their name, telephone number, the name of any group, business, or agency they are representing, if applicable, and whether they wish to speak at the afternoon or evening session. The deadline for pre-registration is **November 7, 2003**. Persons will be called to speak in the order in which they pre-registered. Those wishing to speak but that did not pre-register will be accommodated at each session as time allows. Those wishing to speak at both the afternoon and evening sessions will also be accommodated as time allows and after all others have had an opportunity to participate in the evening session. As SEA desires for as many persons as possible to participate and given that there will be a limited amount of time, all speakers are strongly encouraged to prepare

summary oral comments, and submit detailed comments in writing. SEA also encourages groups of individuals with similar comments to designate a representative to speak for them.

B. Final Memorandum of Agreement

After the close of the 45-day comment period on the attached proposed draft MOA, SEA will review all written comments, as well as any oral comments received at the public meeting. If trail use is unsuccessful, SEA will then prepare a final MOA.

III. Description of the Proposed Draft Memorandum of Agreement

Based on the comments received in the October 2002 Notice and in consultation with the ACHP, the SHPO, and NS, SEA has developed a proposed draft MOA for this proceeding, assuming that no agreement for trail use is reached. The proposed draft MOA briefly summarizes the background of this proceeding and then sets forth several stipulations. As discussed above, because imposition of any nonconsensual mitigation other than documentation would be an unauthorized taking under the Fifth Amendment, the mitigation measures in the proposed draft MOA are limited to documentation.

The SHPO, NS, and SEA are currently working together to develop a list of representative structures on the line. Documentation of these structures will serve to document the historic qualities of the line as a whole. The first stipulation of the draft MOA contains a provision requiring the list of representative structures to be completed prior to the commencement of any documentation efforts. The first stipulation also requires NS to document the NS-controlled portion of the rail line by documenting appropriate representative sites and structures on the line, to Pennsylvania state standards, as described in footnote 13. SEA believes that documentation to Pennsylvania state standards is appropriate in this proceeding. Previously, the SHPO, Conrail, and the Board had all agreed that documentation to Pennsylvania state standards was the appropriate level of documentation when formulating the previous proposed draft MOA for this proceeding, and SEA has received no new information to indicate that the level of documentation should now be different. In addition, the stipulation requires NS to conduct archival research and to consolidate all information – documentation and the results of the archival research – into one cohesive document to be archived at the SHPO's office.

Although the tracks and ties have already been removed from most of the right-of-way, the proposed draft MOA also sets forth provisions for the protection of unexpected discoveries of historic resources, including archeological resources, in the event that documentation efforts identify a potential for unanticipated effects on archeological sites or in the event that one or more archeological sites, any additional cultural resources, or human remains are discovered during any remaining salvage activities associated with the abandonment.

IV. Written Comments on the Proposed Draft Memorandum of Agreement

If you wish to file written comments regarding the attached proposed draft MOA, please send an **original and two copies** to the Surface Transportation Board, Case Control Unit, 1925 K Street, NW, Washington, DC 20423-0001, to the attention of Troy Brady. **Please refer to Docket No. AB-167 (Sub-No. 1095X) in all correspondence addressed to the Board.** If you have questions regarding this Notice, you should contact **Troy Brady**, the environmental contact for this case, by phone at (202) 565-1643 or by fax at (202) 565-9000. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

As discussed above in Section II, written comments will also be collected at the public meeting.

Date made available to the public: October 20, 2003

Comment due date: December 3, 2003.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams
Secretary

MEMORANDUM OF AGREEMENT
AMONG THE SURFACE TRANSPORTATION BOARD
AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
AND
THE PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION
AND
NORFOLK SOUTHERN RAILWAY COMPANY

REGARDING DOCKET No. AB-167 (Sub-No. 1095X)
CONSOLIDATED RAIL CORPORATION
– ABANDONMENT EXEMPTION –
LANCASTER AND CHESTER COUNTIES, PENNSYLVANIA

WHEREAS, in 1989 Consolidated Rail Corporation (Conrail) filed a notice of exemption with the Interstate Commerce Commission (ICC)¹ pursuant to 49 CFR 1152.50 seeking an exemption from the requirements of 49 U.S.C. 10903 to abandon a segment of a line of railroad commonly known as the Enola Branch. The Enola Branch extends generally westward from Milepost 0.0 in Parkesburg, Chester County, PA to Milepost 33.9 at Port in Lancaster County, PA.² The Enola Branch passes through the Townships of Sadsbury, Bart, Eden, Providence, Martic, Conestoga, and Manor, and the Borough of Quarryville in Lancaster County, and the Township of West Sadsbury, the Borough of Atglen, and the City of Parkesburg in Chester County;

WHEREAS, the portions of the Enola Branch that are the subject of this Memorandum of Agreement are the portions between Mileposts 0.0 to 1.5 and between Mileposts 4.0 to 33.9.³

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, abolished the ICC and transferred certain rail functions, including the rail line abandonment functions at issue in this case, to the Surface Transportation Board (Board), effective January 1, 1996.

² Conrail described the Enola Branch in its 1989 notice of exemption filing as two parallel tracks of a double tracked line. Track number 1 extended 32.6 miles from Milepost 1.1 in Parkesburg to Milepost 33.7 in Manor Township. Track number 2 extended 33.9 miles from Milepost 0.0 in Parkesburg to Milepost 33.9 in Manor Township.

³ Conrail sold the portion of the Enola Branch from Milepost 1.5 to Milepost 4.0 to the Southeastern Pennsylvania Transportation Authority in 1996. On June 23, 1997, Norfolk Southern

WHEREAS, the ICC issued a decision served February 22, 1990 allowing the abandonment subject to a condition, developed as a result of consultation with the Pennsylvania State Historic Preservation Officer (SHPO), that Conrail take no steps to alter the historic integrity of the bridges - the only properties on the Enola Branch that had been identified as potentially eligible for inclusion on the National Register of Historic Places (National Register) - until completion of the section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f;

WHEREAS, the purpose of the condition was to allow the ICC to work with consulting parties to develop a plan to avoid, minimize, or mitigate any adverse effects of the abandonment on the bridges. The development of a mitigation plan was held in abeyance, however, pending negotiations to transfer the Enola Branch for interim trail use/rail banking under 16 U.S.C. 1247(d) (Trails Act) or other public use under former 49 U.S.C. 10906 (now 49 U.S.C. 10905). When those negotiations proved unsuccessful,⁴ the agency resumed the NHPA process;

WHEREAS, while the Board's Section of Environmental Analysis (SEA) was working through the steps of the NHPA process, Friends of the Atglen-Susquehanna Trail, Inc. (FAST) filed a petition with the Board to reopen the proceeding and broaden the NHPA condition so that it would apply to the entire Enola Branch;

WHEREAS, the Board denied FAST's request in a decision served October 2, 1997, and FAST filed a petition for reconsideration;

WHEREAS, the Board, in a decision served August 13, 1999, believing that the only part of the NHPA process that remained open was the development of mitigation for the bridges determined to be historic, denied FAST's petition for reconsideration of the 1997 decision and FAST then sought judicial review;

WHEREAS, in Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Bd., 252 F.3d 246 (3rd Cir. 2001), the United States Court of Appeals for the Third Circuit vacated the

Railway Company (NS) and CSX Transportation Inc. sought permission from the Board to acquire Conrail and to divide its assets between them. On July 23, 1998, the Board approved the Conrail Acquisition. CSX Corp., et al. - Control - Conrail Inc., et al., 3 S.T.B 196 (1998). The Enola Branch property was allocated to Pennsylvania Line LLC, a subsidiary of Conrail, as part of the Conrail Acquisition transaction. NS operates the Pennsylvania Line LLC allocated assets under an operating agreement approved by the Board. This Memorandum of Agreement pertains to the NS-controlled portions of the Enola Branch.

⁴ The ICC terminated the trail use negotiation condition with respect to the Enola Branch in a decision served April 19, 1993.

Board's 1997 and 1999 decisions and remanded the case back to the Board, ruling that the Board had failed to comply fully with the procedural requirements of the NHPA;

WHEREAS, SEA has reinitiated the section 106 historic review process pursuant to the court's remand and the procedural provisions of the NHPA;

WHEREAS, SEA has consulted with the Advisory Council on Historic Preservation (ACHP), the SHPO, and NS, and in two separate Notices to the Parties and a public meeting solicited comments from consulting parties and the public regarding the possibility of using the portions of the Enola Branch that are the subject of this Memorandum of Agreement for interim trail use/rail banking, and assuming that trail use is unsuccessful, completion of the mitigation phase of the section 106 process;

WHEREAS, based on the Keeper of the National Register's 1999 finding that the entire Enola Branch is eligible for inclusion in the National Register, and in consultation with the ACHP and the SHPO, SEA has determined that the entire Enola Branch is eligible for inclusion in the National Register;

WHEREAS, based on consultation with the ACHP and the SHPO and the public comments, SEA has determined that the abandonment at issue here would adversely affect the Enola Branch;

WHEREAS, NS already has paid to the Pennsylvania Railroad Museum \$15,437 to fund an exhibit or video of the history of the Enola Branch;

WHEREAS, based on consultation with the ACHP, the SHPO, NS, and on all of the comments received from interested and official consulting parties, SEA has devised additional measures to mitigate the adverse effects on the Enola Branch that would be caused by the abandonment;

NOW THEREFORE, the Board, the ACHP, the SHPO, and NS agree that the consummation of the abandonment of the Enola Branch shall be subject to the following stipulations to take into account and to mitigate the effect of the abandonment on historic properties.

STIPULATIONS

The Board shall ensure that the following measures are carried out. The Board may direct NS (and its contractor) to assist in fulfilling these stipulations or may use an independent third party contractor, working under SEA's supervision, direction and control, and at NS's expense, to assist in fulfilling these stipulations.

I. ADDITIONAL DOCUMENTATION REQUIREMENTS

NS shall retain a professional historian to prepare documentation and to conduct archival research of the history of the Enola Branch rail line (to include the segments of the Enola Branch from Milepost 0.0 to Milepost 1.5 and Milepost 4.0 to Milepost 33.9 and appropriate representative structures). The documentation shall be completed in accordance with the relevant state standards as specified by the SHPO and outlined in the guidance document titled “How To Complete The Pennsylvania Historic Resource Survey Form.” The historian also shall prepare a written report discussing the methods and results of the archival research.⁵

Prior to the commencement of documentation efforts, the Board, the SHPO, and NS shall work together to develop a list of representative structures on the Enola Branch. Documentation of these structures shall serve to document the historic qualities of the line as a whole.

Upon completion of the documentation and archival research, NS shall consolidate all information into one cohesive document and submit the document to the Board’s Federal Preservation Officer (FPO) (the Chief of SEA), the ACHP, and the SHPO for review.

As provided in Pennsylvania state standards, this document shall include:

A. a Photo/Site Plan Sheet, which will contain: (1) historic name of the property; (2) county; (3) non-color coded sketch maps or other non-color maps showing the location of the rail line; and (4) photographs of the representative structures;

B. a Data Sheet, which will describe the rail line, its historic function and current use, the representative structures, including, relevant historical and descriptive information such as the architectural classification, composition of the exterior materials, classification of the structural system, width, depth and height measurements, dates of construction and known significant changes or rebuilding, proposed disposition of the structures after abandonment, and, to the extent relevant information exists in railroad or local libraries, museums or archives, cultural affiliations, associated individuals or events, and names of builders or craftsmen who constructed the rail line;

⁵ Archival research that is conducted from information or records supplied by or available at the railroad, the Pennsylvania Historical and Museum Commission, the Pennsylvania State Archives, the Lancaster County Historical Society, the Southern Lancaster Historical Society, the Chester County Historical Society, the Railroad Museum of Pennsylvania and the Pennsylvania Railroad Technical and Historical Society (as available) shall satisfy this requirement.

C. a Narrative Sheet, which will include a physical description (a brief description of the current and historic physical appearance and condition of the rail line segments and all associated structures) and a historical narrative (a summary of the history and significance of the property);

In addition to the requirements of the Pennsylvania state recordation standards, the document shall also include:

- A. a written report describing the methods and results of the archival research; and
- B. copies of any relevant historical documents found pursuant to the archival research, as well as any available maps of the rail line and local area.

The Board's FPO, the ACHP, and the SHPO shall have 30 days to review and comment on the draft document. At the end of the 30 day period, NS shall prepare a final version of the document, taking into consideration any comments received, and submit the final document to the Board, the ACHP, and the SHPO. NS shall also submit two (2) additional copies of the final document to the SHPO to be archived at the SHPO's office.

II. DISPUTE RESOLUTION

Disagreement and misunderstanding about how this Memorandum of Agreement is or is not being implemented shall be resolved in the following manner:

A. If the SHPO or NS should object in writing to the Board's FPO regarding any action carried out or proposed with respect to the undertaking or implementation of this Memorandum of Agreement, then the Board's FPO shall consult with the objecting party to resolve this objection. If after such consultation the Board's FPO determines that the objection cannot be resolved through consultation, then the Board's FPO shall forward all documentation relevant to the objection to the ACHP, including the Board's proposed response to the objection. Within 45 days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

1. Provide the Board with a staff-level recommendation; or
2. Notify the Board that the objection will be referred for formal comment pursuant to 36 CFR 800, and proceed to refer the objection and comment.

B. The Board shall take into account any ACHP comment or recommendations in reaching a final decision regarding its response to an objection. The Board's

responsibility to carry out all actions under the Memorandum of Agreement that are not the subjects of the objection shall remain unchanged.

III. POST REVIEW DISCOVERY

In the event that the professional historian identifies a potential for unanticipated effects on archeological sites during the implementation of this Memorandum of Agreement, NS shall notify the Board's FPO. The Board's FPO shall then consult with the SHPO to determine whether additional mitigation measures are necessary. If the Board's FPO and the SHPO determine that additional mitigation measures are required, all signatories shall consult to devise appropriate mitigation measures and amend the Memorandum of Agreement, pursuant to Part IV of this Memorandum of Agreement.

In the event that one or more archeological sites, any additional cultural resources, or human remains are discovered during NS's salvage activities, NS shall immediately cease all work and notify the Board's FPO. The Board's FPO shall then consult with the SHPO to determine whether additional mitigation measures are necessary. If the Board's FPO and the SHPO determine that additional mitigation measures are required, all signatories shall consult to devise appropriate mitigation measures and amend the Memorandum of Agreement, pursuant to Part IV of this Memorandum of Agreement.

Any additional mitigation developed shall be consistent with the provisions of the Pennsylvania Historic & Museum Commission's Policy on the Treatment of Human Remains adopted March 10, 1993, the Native American Graves Protection and Repatriation Act, and ACHP guidance documents, such as the ACHP's *Recommended Approach for Consultation on Recovery of Significant Information From Archaeological Sites*.

IV. AMENDMENT

Any Signatory to this Memorandum of Agreement may request that it be amended, whereupon the parties shall consult to consider the proposed amendment. 36 CFR 800 shall govern the execution of any such amendment.

V. TERMINATION

A. If the terms of this Memorandum of Agreement have not been implemented within 1 year of the execution of this agreement, this Memorandum of Agreement shall be considered null and void, unless the parties agree to a written extension. In such an event, the Board shall notify the parties to this Memorandum of Agreement, and if NS chooses to continue with this undertaking, the Board shall re-initiate review of this undertaking in accordance with 36 CFR Part 800.

B. Any signatory to the Memorandum of Agreement may terminate it by providing thirty (30) days notice to the other parties, provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the Board shall comply with 36 CFR 800 with regard to the review of the undertaking.

VI. SCOPE OF AGREEMENT

This Memorandum of Agreement is limited in scope to the abandonment of the portions of Enola Branch from Milepost 0.0 to 1.5 and Milepost 4.0 to 33.9 and is entered into solely for that purpose. Execution and implementation of this Memorandum of Agreement by the Board, the ACHP, the SHPO, and NS evidences that the Board has afforded the ACHP an opportunity to comment on the project and its effects on historic properties, and has taken into account the effects of the undertaking on those properties, and has, therefore, satisfied its section 106 responsibilities for this undertaking.

SIGNATORIES:

Advisory Council on Historic Preservation

State Historic Preservation Officer
Pennsylvania Historical and Museum Commission, Bureau for Historic Preservation

Surface Transportation Board

Norfolk Southern Railway Company

CONCURRING PARTIES:

Friends of the Atglen-Susquehanna Trail

Historic Preservation Trust of Lancaster County

Lancaster County Conservancy

Lancaster Farmland Trust

Northeast Regional Field Office of the Rails-to-Trails Conservancy

Pennsylvania Department of Transportation

Southern End Community Association

Township of Bart

Township of Conestoga

Township of Eden

Township of Martic

Township of Providence

Township of Sadsbury

Township of West Sadsbury